Schengen Entry Bans for Political Reasons? The Case of Lyudmyla Kozlovska

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On 13 August 2018, Lyudmyla Kozlovska, an Ukrainian national and the President of the Open Dialog Foundation (ODF) in Poland, was detained following a passport control at the Belgian airport in Brussels on the basis of a Polish entry ban reported into the Schengen Information System (SIS II). One day later, the Belgian border authorities deported her to Kiev, Ukraine. According to information provided on the website of the Open Dialog Foundation, the entry ban on Kozlovska was included in the SIS II by the Polish authorities on 31 July 2018. In accordance with Article 6 of the Schengen Borders Code, all other Schengen States must on that basis consider her as an 'inadmissible alien' and refuse entrance to the Schengen territory. This case raises questions on the discretionary power of states to use the SIS II for entry bans on 'unwanted migrants' and the obligation of executing states, in this case Belgium, to check the legitimacy or proportionality of these other states decisions. Furthermore, this case illustrates the necessity of effective remedies against decisions reported in large-scale databases such as SIS.

Limitations to the issuing of an entry ban in SIS

According to Article 24 of the SIS II Regulation, a third-country national may be reported in the SIS on two grounds: either his/her expulsion, refusal of entry or removal as a measure of immigration law resulting into an entry ban on the basis of the (Return Directive 2008/115), or public order or security grounds. During her application for a EU long term residence status, Kozlovska, for ten years a legal resident in Poland, was informed that she was not reported into the SIS. When applying for access to her file of her application for a long term status, this was refused on the ground that such disclosure would cause 'serious damage to the Republic of Poland'. This information indicates that she was not reported on the basis of immigration grounds: in accordance with the Return Directive, if the Polish authorities would have withdrawn her residence status, she should have been issued first a return decision and return decisions are not automatically reported in the SIS II. Only if no 'period of voluntary return' has been granted a return decision will be followed by an entry ban to be reported in the SIS.

A SIS alert on public order or security grounds can be based on either a conviction of an offence by a Member State, punishable by a term of imprisonment of at least one year, or when there are serious grounds for believing that he or she 'has committed serious criminal offences or concerning whom there are clear indications of an intention to commit such offences on the territory of a Member State'.

These grounds, already included in the Schengen Convention of 1990, have been criticised for providing a wide and disproportional basis for refusal of entry and expulsion. On the basis of the first ground, a conviction for a minor crime in one of the Schengen States may already result into a long-term banishment from the whole Schengen territory. Furthermore, the second ground offers Schengen states a wide margin of appreciation of not only who is to be considered as a risk of committing a serious crime, but also what is to be considered a serious crime.

The power of states to issue a SIS alert is however restricted by two conditions, added in the SIS II Regulation of 2006. First, every SIS entry ban must be based on an individual assessment and second, before issuing an alert, Member States must determine whether the case is 'adequate, relevant, and important enough' (Articles 21 and 24). Any decision to report a person as 'inadmissible' into the SIS is therefore bound by the purpose of the SIS (to 'ensure a high level of security within the area of freedom, security and justice of the European Union, including the maintenance of public security and public policy and the safeguarding of security in the territories of the Member States') and the principle of proportionality.

In *Zh. and O*, addressing the question when on the basis of public order grounds, a Member State may decide to provide no voluntary period of return on the basis of the Return Directive, the CJEU held that while 'Member States essentially retain the freedom to determine the requirements of public policy in accordance with their national needs, which can vary from one Member State to another and from one era to another', these requirements must be interpreted strictly 'to ensure that the fundamental rights of third-country nationals are respected when they are removed from the European Union'. The CJEU applied the same criteria as with regard to EU citizens on the basis of the Citizenship Directive, stating that the 'risk to public policy' must be based on a case-by-case basis in

order to ascertain whether the personal conduct of the third-country national concerned poses ‘a genuine and present risk to public policy’. Furthermore, the principle of proportionality and the fundamental rights of the person at stake must be taken into account (para. 50, 69).

Considering the protection of fundamental rights, in the case of Mrs Kozlovska who has a family in Poland and is married to a Polish citizen, the entry ban affected both her right to family life (8 ECHR, 7 EU Charter) and her right to freedom of expression (10 ECHR, 9 EU Charter). In *Piermont*, dealing with Article 10 ECHR and a French measure of expulsion from French Polynesia and a prohibition on re-entry to New Caledonia against a German member of the European Parliament, the ECtHR found that Article 10 ECHR was violated because the French authorities did not strike a fair balance ‘between, on the one hand, the public interest requiring the prevention of disorder and the upholding of territorial integrity and, on the other, [the applicant’s] freedom of expression”.'

It seems unlikely that Poland could invoke Article 16 ECHR according to which Articles 10, 11 (freedom of religion) and 14 (non-discrimination) does not prevent States ‘to limit the political activities of aliens’. The ECtHR has never found any justification for the use of this exception, nor for any differentiated treatment between nationals and non-nationals with regard to the protection of the freedom of expression. In *Perinçek*, para 121-123, the ECtHR underlined that the clause in Article 16 should be interpreted restrictively and 'construed as only capable of authorising restrictions on 'activities that directly affect the political process'. According to the ECtHR, since the right to freedom of expression was guaranteed by 10 ECHR 'regardless of frontiers', no distinction could be drawn between its exercise by nationals and foreigners.

Role of the executing state

Aside from questions on the legitimacy of the Polish entry ban, the lawfulness of the Belgian decision to enforce the SIS alert by expelling Mrs Kozlovska to Kiev can be questioned as well. Although SIS II is implicitly based on the principle of mutual trust and requires Schengen States to enforce each other’s SIS alerts, a state may have a duty to check their lawfulness or proportionality, if its enforcement would violate fundamental rights of the person at stake.

This has been affirmed by the CJEU on the use of the Dublin system for the transfer of asylum seekers in *NS v SSDH*, with regard to the execution of the European Arrest Warrant (EAW) in *Aranyosi and Căldăraru* and more recently in the important *Celmer* case dealing with the independency of national courts in Poland. In Aranyosi and Căldăraru, the case concerned the treatment of imprisoned persons in the executing state and the question whether extradition would not violate their absolute right of protection against inhuman or degrading treatment (3 ECHR and 4 of the EU Charter).

The *Celmer* judgment dealt with the doubts of the Irish court on whether Polish nationals to be surrendered on the basis of a EAW would receive a fair trial in accordance with Article 47 of the Charter, considering the recent changes in the Polish judicial system. The CJEU held that a judicial authority called to execute a EAW must refrain to give effect to it, if first, it would find ‘a real risk of breach of the essence of the fundamental right to a fair trial on

account of systemic or generalised deficiencies concerning the judiciary, and second, if considering the specific circumstances of the case it would find substantial grounds to believe the requested person would run that risk (para. 68). Only when on the basis of Article 7(2) TEU, the European Council would have determined a breach of the principles of Article 2 TEU in a Member State, national courts should, according to the CJEU, refuse the execution of EAW of that state automatically (70-74). Although, see the comments of Van Ballegooij/Bárd, this seems to be a high threshold for national courts to rebut trust, it is important that the CJEU underlines the duty to investigate and assess independency and impartiality of courts before extradition. Where the aforementioned cases dealt with the expulsion or extradition from one Member State to another Member State, in *Commission v Spain*, the CJEU specifically dealt with SIS-alerts for the refusal of entrance on third-country national spouses of EU citizens. In this judgment, the CJEU found that the refusal of a visa or entry to a third-country national, which is solely based on a SIS alert without checking whether he or she presents a genuine, present and sufficiently serious threat, is in violation of the rights of family members of EU citizens on the basis of EU law.

Therefore, it seems arguable to claim that before expelling Mrs Kozlovska to Kiev, the Belgian authorities should have checked first whether this expulsion would not violate her rights to freedom of expression, family life, or effective judicial protection, but certainly her right to residence as a family member of a EU citizen.

Access to legal remedies

Third-country nationals reported into SIS II on the basis of public order and security reasons will generally only be informed about the existence of this report when confronted with a refusal of visa or entry, (extension of) a residence permit, or as in this case, deportation. This makes it difficult to challenge SIS alerts in time. However, on the basis of Article 43 SIS II Regulation, a person may bring an action before the courts or the authority competent under the law of 'any Member State' to access, correct, delete or obtain information or to obtain compensation in connection with an alert relating to him or her. Furthermore, it provides that Member States must undertake mutually to enforce final decisions handed down by these courts or authorities. This means that persons reported in SIS II can start legal proceedings in any of the Schengen states and if subsequently a national court or authority in that state decides the entry ban is unlawful, the reporting state must delete the entry ban from SIS II. This provision therefore offers an important basis for starting legal remedies against SIS entry bans, specifically when in the reporting states no effective remedies against SIS alerts are available, as seems the case in Poland according to information of the Helsinki Foundation.

Final remarks

SIS II is currently used by 22 EU Member States plus the four Schengen Associate countries, Iceland, Norway, Switzerland, and Liechtenstein. Bulgaria, Romania, Croatia, and the UK operate SIS only for the purpose of law enforcement cooperation, while Cyprus and Ireland are not connected to the SIS yet. According to the statistics provided by the responsible EU Agency euLISA, SIS II held in 2017 501.996 alerts on third-country nationals for the purpose of refusal of stay/entry, which is 56% of all the data on individuals

in SIS II (which also may include persons issued with a EAW, missing persons, persons to assist in a judicial procedure, and persons entered ‘for discreet and specific checks’). Although, as mentioned above, the CJEU and the ECtHR provided relevant criteria protecting individual’s rights, further clarification on the powers and obligations of the Schengen states when using SIS remains necessary. Not only because of the increasing and interlinked use of EU large-scale databases for migration and security purposes, but also considering recent national developments, affecting EU principles of the rule of law and democracy.

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